

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
DAVID RAE BARTLETT and) No. 07-63647-fra13
LYNN MARIE BARTLETT,)
Debtors.) MEMORANDUM OPINION

Debtors have failed to strictly comply with the pre-petition counseling requirements imposed by 11 U.S.C. § 109(h). They seek an order waiving the requirement on the grounds that they have moved promptly to remedy the defect, and that dismissing the case would prejudice creditors and result in unnecessary administrative costs. The Court finds that the Debtors have not established grounds for relief from the provisions of § 109(h), and that the case should be dismissed.

I. FACTS

Debtors filed their petition for relief under Chapter 13 of the Bankruptcy Code on December 29, 2007. Accompanying their petition were Certificates of Credit Counseling Briefing attesting that each received the briefing required by Code § 109(h) on June 27, 2007 - 185 days prior to the date the petition was filed.

On January 2, 2008, the Court issued an order and notice directing the Debtors to file either an amended certificate reflecting receipt of a briefing within 180 days prior to the filing date, a motion for an extension of time to file, or an exemption from the briefing requirement altogether. On January 3, the Debtors filed their motion to extend the time to file a certificate, using the Court's standard Form 100.3. The motion states in part that:

We completed the required credit counseling briefing on June 27, 2007, and originally planned to sign and file our bankruptcy case on November 28, 2007. However, our vehicle was repossessed the night before our scheduled appointment to sign and file the bankruptcy case. This delayed our filing for one month. We signed the bankruptcy petition on December 28, 2007 - within 184 days of completing the briefing - and the case was filed on the 185th day after completing the briefing. We completed a second counseling session on January 2, 2008, which would allow us to immediately file a new case if this case is dismissed. Dismissing this case will only prejudice creditors and result in the unnecessary administrative costs of filing a new case.

II. STATUTORY REQUIREMENTS

Code § 109(h)1) provides that:

Subject to paragraphs 2 and 3, and notwithstanding any other provision of this section, an individual may not be a debtor under this title unless such individual has, *during the 180-day period preceding the date of filing of the petition by such individual*, received from an approved nonprofit budget and credit counseling agency described in § 111(a) an individual or group briefing (including a briefing conducted by telephone or on the internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis. [Emphasis added.]

A debtor may commence a case under the Code notwithstanding
requirement by submitting a certification which describes exigent

1 circumstances that merit a waiver of the requirements described above,
2 and which states that the debtor requested services from an approved
3 counseling agency but was unable to obtain the services during the five
4 day period beginning on the date on which the debtor made the request. If
5 the certification is satisfactory to the court, it may, for up to 30
6 days, waive the filing requirement. Code § 109(h)(3)(A).

III. DISCUSSION

21 The Debtors argue that, notwithstanding their lack of strict
22 compliance, the case should not be dismissed in light of the potential
23 for prejudice to creditors and the unnecessary administrative costs
24 entailed in filing a new case. In effect, the Debtors seek an equitable
25 exception to strict compliance with the terms of § 109(h).

26 Bankruptcy courts have been varied in their responses to this

1 issue. The "vast majority" of courts considering the issue have strictly
2 construed the statute's time requirements. In re Ruckdaschel, 364 B.R.
3 724, 729 (Bankr. D. Id. 2007). Courts adhering to this view have
4 dismissed cases filed by debtors who are deemed ineligible under
5 § 109(h). Other courts have held that the provisions of § 109(h) are not
6 jurisdictional, and that dismissal is not mandated when debtors are
7 ineligible. In re Manalad, 360 B.R. 288 (Bankr. C.D. Ca. 2007); In re
8 Enloe, 373 B.R. 123 (Bankr. D. Co. 2007); In re Hess, 347 B.R. 489
9 (Bankr. D. Vt. 2006).

10 Another eligibility requirement in the Code is to be found at
11 § 109(g): this section provides that an individual "may not be a debtor
12 under this title" if the individual has been the debtor in a case within
13 the 180 days preceding the petition if the prior case was dismissed for
14 failure to comply with a court order, or voluntarily after a motion for
15 relief from the automatic stay had been filed. In In re Luna, 122 B.R.
16 575 (9th Cir. BAP 1991), the Bankruptcy Appellate Panel for the Ninth
17 Circuit held that § 109(g) was not jurisdictional in nature, and that
18 mechanical application of this section was inappropriate where doing so
19 would produce an illogical, unjust, or capricious result. Since
20 §§ 109(g) and (h) are similar in language and intent, it stands to reason
21 that the standard set out in Luna is applicable to § 109(h).

22 Dismissal in this case, while inconvenient and expensive, is
23 neither illogical nor unjust. The statute imposes a clearly defined
24 requirement: that debtors must undergo counseling prior, but not more
25 than 180 days prior, to commencement of their bankruptcy cases. This is
26 part of a consistent statutory scheme designed to encourage (if not

1 force) prospective debtors to explore alternatives before commencing a
2 bankruptcy case. Debtors here failed to comply with that requirement and
3 offer no substantial justification for that failure. The result is that
4 they will have to file again: this may require payment of a new filing
5 fee and, perhaps, the need to seek an extension of the automatic stay
6 under Code § 362. Unlike § 109, relief from these provisions is provided
7 for in the Code, and does not require a resort to equity. The filing fee
8 may be waived if the Debtors qualify, Fed.R.Bankr.P. 1006(c), and the
9 automatic stay may be extended,11 U.S.C. §362(c)(3)(B). Neither the
10 inconvenience nor the expense attendant to dismissal are insurmountable.
11 The existence of these remedies in the statutory scheme precludes ready
12 application of equitable remedies.

13 Debtors point out that neither the Trustee nor any other
14 interested party has sought dismissal of the case. In some contexts this
15 might mean that the case would be allowed to continue. See e.g. In re
16 Duffus, 339 B.R. 746 (Bankr. D.Or. 2006). However, provisions such as
17 the one at issue in Duffus merely set out a remedy -dismissal- which may
18 or may not be sought in a given case. Under §109(h), a debtor who has
19 not complied with the briefing requirement is not entitled to any relief
20 under Title 11, including the benefit of the automatic stay or any
21 discharge. Absent circumstances satisfying the Luna criteria, no further
22 relief may be extended.

23 IV. CONCLUSION

24 Code § 109(h) should be strictly applied according to its
25 terms. Where debtors are found to be ineligible under this section the
26 case should be dismissed, unless to do so would be illogical, unjust or

1 capricious under the circumstances. That is not the case here, and the
2 case must be dismissed.

3 The Court recognizes that substantial inconvenience to the
4 parties may result if particularly aggressive creditors move to seize
5 assets between the time a case is dismissed and a new one is filed. In
6 most instances such seizures would be subject to avoidance as
7 preferences. In order to avoid that problem, the order dismissing the
8 case will not take effect for 10 days.

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11 FRANK R. ALLEY, III
12 Bankruptcy Judge
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